

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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JOHN COTTAM,

Plaintiff,

v.

16 Civ. 4584 (RJS)

6D GLOBAL TECHNOLOGIES, INC.,  
et al.,

Defendants.  
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New York, N.Y.  
July 31, 2017  
2:10 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

GOTTLIEB & JANEY, LLP  
Attorneys for Plaintiff

BY: DERRELLE JANEY  
SARAH A. ADAM

CATAFAGO FINI LLP  
Attorneys for Defendants  
BY: TOM M. FINI

1 (Case called)

2 THE COURT: Let me take appearances. For the  
3 plaintiff.

4 MR. JANEY: For the plaintiff John Cottam, Gottlieb &  
5 Janie by Derrelle Janie. And I'm joined at counsel's table by  
6 my colleague, Sarah Adam.

7 THE COURT: Ms. Adam and Mr. Janie, good afternoon.

8 MR. FINI: Good afternoon, your Honor, my name is Tom  
9 Fini of Catafago Fini, LLP, and I'm here on behalf of the  
10 defendants 6D Global Technologies, 6D Acquisitions, Inc., and  
11 defendant Tejune Kang.

12 THE COURT: Good afternoon.

13 We are getting a bit of a late start because I just  
14 had received or I just had a chance to read a letter that  
15 Mr. Fini docketed today related to the pending FINRA  
16 arbitration and a contemplated request to stay this action  
17 pending the FINRA arbitration, which I do recall some  
18 discussion about that previously. Of course, that was before I  
19 issued an order that just kind of telegraphed where I thought  
20 this was likely to go on the merits.

21 I will say I wrote a draft that was going to sua  
22 sponte convert this to a motion for summary judgment and rule  
23 because it seems to me that the contract is unambiguous and  
24 supports the plaintiffs. I then thought, well, I would rather  
25 at least give the parties, and particularly the defendants, an

1 opportunity to be heard on the motion for summary judgment  
2 before ruling, so that was my reason for pulling back, issuing  
3 a short order suggesting that I thought the contract at issue  
4 was likely to result in summary judgment in favor of the  
5 plaintiffs, and then talk about next steps.

6 What I've got in the interim then, Mr. Fini has come  
7 in and has submitted this letter and also has made some other  
8 points before that.

9 Let's talk about the stay.

10 Mr. Janie, it says here that you're opposed to the  
11 stay. That's because you smell blood in the water based on my  
12 order, or something else?

13 MR. JANEY: Several things, your Honor. And I do note  
14 the conversation that we had with then counsel for 6D at the  
15 time as reflected in the joint submission.

16 To your question, your Honor, what's different, there  
17 are several things that have since changed. At the time, and I  
18 believe that the transcript from the September 2016 appearance  
19 in sum and substance bears this out, we believed then that the  
20 FINRA matter would proceed much more quickly than, for example,  
21 there would be discovery yielded from that proceeding that  
22 would then potentially be relevant, at least the thinking was  
23 at the time, to the district court proceeding. That has not  
24 turned out to be the case.

25 We are in fact now in discovery in the FINRA

1 proceeding. There has not been a scintilla of documents  
2 produced from the other side in the FINRA proceeding. We  
3 anticipate having to file a motion to compel. That's No. 1.

4 No. 2, everyone seems to want a stay of these  
5 proceedings, whether it's in the FINRA case or now upon  
6 Mr. Fini's appearance in the district court case. And what I  
7 mean by that, to be explicit, your Honor, counsel for the FINRA  
8 respondents has requested a stay. Our position is pending this  
9 district court action we have told him that we would oppose  
10 that. To be clear, he has not filed that at this point.

11 THE COURT: When did you have this communication with  
12 counsel in the FINRA arbitration?

13 MR. JANEY: Approximately three weeks ago, your Honor.

14 THE COURT: Before or after my order?

15 MR. JANEY: Certainly before your order, your Honor,  
16 and he has renewed that request and we have told him that we  
17 would oppose it. He hasn't filed anything at this point.

18 We have told counsel for the FINRA respondents the  
19 same thing, that in sum and substance in my very, very brief  
20 telephone conversation with new counsel for the 6D defendants  
21 pending before your Honor, that we believe that a stay on the  
22 facts and the law here is inappropriate. And to amplify that,  
23 your Honor, I've only had a brief amount of time to take a look  
24 at Mr. Fini's letter.

25 THE COURT: It was only docketed at 1:17.

1 MR. JANEY: My colleague brought it with me to court.  
2 I saw a piece of it on my telephone. As far as I can tell,  
3 your Honor, I just think that there are some factual issues  
4 that are not correct.

5 By way of example, looking at counsel's letter on page  
6 2, what looks to me to be the third full paragraph on that  
7 page, there is a suggestion that there would be -- I'm reading  
8 from, your Honor, a real risk that there will be inconsistent  
9 findings of facts and law in the two separate proceedings.  
10 There, your Honor, we would submit that that demonstrates a  
11 lack of understanding of what's going on in the FINRA  
12 proceeding, specifically what is alleged in the FINRA  
13 complaint.

14 The gravamen of the FINRA complaint, your Honor, is  
15 that the broker, the registered rep and the broker-dealer,  
16 affirmatively made false representations to Dr. Cottam. The  
17 documentary evidence by way of e-mails makes that clear. The  
18 FINRA statement of claim articulates that throughout the body  
19 of the document. There we have alleged in the main allegation,  
20 your Honor, a 10b and 10b-5 allegation. To the extent that  
21 there is a breach of contract claim in the FINRA proceeding, it  
22 has no bearing to what's before the district court.

23 The breach of contract claim in the FINRA statement of  
24 claim, your Honor, is predicated on the customer agreement,  
25 that is, the agreement between the broker-dealer, then Radner.

1 It has now has a new name, CEGG, if I am saying that correctly,  
2 and Dr. Cottam. It does not allow a breach of the contract  
3 that is pending before your Honor.

4 Now, certainly by way of a secondary level there needs  
5 to be some discussion in the FINRA arbitration about this  
6 particular contract, but in the main, your Honor, this  
7 particular contract is not medically what's at issue. Again,  
8 the 10b, 10b-5 claims are about the false statements that the  
9 broker-dealer and the registered rep made to Dr. Cottam.

10 Your Honor, if I can just further build on that, so  
11 that the Court is clear for the purposes of the record, at  
12 paragraphs 44 through 48, for example, of the FINRA statement  
13 of claim, there it articulates, for example, that Dr. Cottam  
14 specifically asked the broker-dealer and the registered rep,  
15 based on his prior experience with Benjamin Wey, who is the  
16 criminal defendant underlying this action, that Dr. Cottam  
17 might be put into a transaction with him. The broker-dealer  
18 affirmatively misled Dr. Cottam that he would be put into a  
19 transaction with Benjamin Wey.

20 Similarly, your Honor, we also point out at paragraph  
21 52 of the FINRA statement of claim that Dr. Cottam sought  
22 specific assurances that this transaction would not include a  
23 reverse merger or a shell company. The broker-dealer and the  
24 registered rep affirmatively lied to him about that and there  
25 are e-mail correspondences to buttress that.

1 I would go into such detail, although I'm at somewhat  
2 of a disadvantage because I'm just receiving the letter motion,  
3 that this action pending before your Honor has nothing to do in  
4 the gravamen of the allegations that are going on in the FINRA  
5 arbitration. To the extent that counsel is making an assertion  
6 based on the bases that are prevalent in this district and in  
7 the circuit for considerations of a permissive stay, we would  
8 submit that one of the main considerations, that is,  
9 inconsistent findings of law, simply here, your Honor, is  
10 erroneous.

11 THE COURT: Because the FINRA arbitration is not going  
12 to be resolving the contract that's before me here?

13 MR. JANEY: That's correct, your Honor.

14 THE COURT: What about the paragraph below the one you  
15 just quoted from which says that: Absent a stay, the 6D  
16 defendants apparently have only 13 days to add to this action  
17 every investor who invested under the subscription agreement,  
18 as those investors are necessary parties to the claim for  
19 reformation made by the 6D defendants in their counterclaim.

20 MR. JANEY: If I can parse it insofar as I understand  
21 it, just focusing on the facts for a moment, and speaking to  
22 the facts of it without getting into the substance, there was a  
23 global settlement conference put forth by counsel for 6D, their  
24 insurance company or their insurance carriers, and their  
25 bankruptcy counsel.

1 My recollection is that that global one-day  
2 conference, which stretched for quite some time, occurred,  
3 approximately, if I recall, your Honor, about three months ago.  
4 It is to my understanding, your Honor, and I'm seeing these  
5 numbers here in the letter, but it is to my understanding that  
6 everyone I was in the room with were the defendants with claims  
7 against 6D and a variety of different pieces of litigation  
8 literally across the country. I was in the room with lawyers  
9 from Florida, lawyers from California.

10 THE COURT: Everybody in the room was --

11 MR. JANEY: They were the universe of what I  
12 understood to be potential claims against 6D and the 6D  
13 defendants.

14 THE COURT: They would be claims under the contract at  
15 issue in this case or based on something different?

16 MR. JANEY: The limitation of that universe, your  
17 Honor, I am not sure. But to my understanding, it is that the  
18 JAMS mediator's job was to bring together the claims that were  
19 being lodged against 6D and try to settle them. As a factual  
20 matter, we did not settle out and, to my understanding, we are  
21 the only remaining claim.

22 As a factual matter, in terms of the current  
23 outstanding claims that people have propagated, I don't know  
24 that these numbers are in fact correct.

25 On the issue of the law of reformation, I think we are



1 conflating a couple of things here. I understand from the  
2 answer and counterclaims that counsel filed on Saturday night  
3 that there is a counterclaim for mutual mistake and unilateral  
4 mistake. I have comments as to that and I'll hold those aside  
5 for the moment.

6 I think, if I understand the paragraph correctly, is  
7 that counsel, in sum and substance, is suggesting that if he is  
8 successful on those counterclaims, then this paragraph would  
9 apply, the issue of reformation of the contract, that the  
10 Court, if I understand the answer and counterclaim, counsel is  
11 looking for the Court to readjust the contract so as to benefit  
12 all of the investors, including those who have not brought an  
13 action.

14 THE COURT: But that's about a subscription agreement  
15 that's different from the contract that's at issue here?

16 MR. JANEY: I understand it to be the same document.

17 THE COURT: I asked you to address that point. There  
18 are a couple of other points that are raised. Anything else  
19 you want to say with respect to this late-breaking letter?

20 MR. JANEY: Other than, your Honor, just to reiterate  
21 my earlier point. The FINRA arbitration in terms of what is  
22 alleged in the causes of action there in the prayer for relief  
23 has no overlap to what is pending before this Court. To be  
24 clear, yes, as I anticipate counsel to say, there is some  
25 aspects of the underlying subscription agreement that would be

1 a point of conversation in the FINRA arbitration, but, your  
2 Honor, we would submit that is of no consequence. FINRA is not  
3 adjudicating the subscription agreement issue. Thank you, your  
4 Honor.

5 THE COURT: Mr. Fini.

6 MR. FINI: Thank you, your Honor.

7 First of all, your Honor, I just wanted to make clear  
8 that the reason I sent the letter only as of today because in  
9 preparing for today I found, as new counsel, the letter that  
10 the parties had jointly submitted in September in which the  
11 parties agreed, actually contemplated, your Honor, the  
12 possibility that you would deny the motion to dismiss, and in  
13 that letter we represented that in that event intended to  
14 jointly seek a stay.

15 THE COURT: That's fine. It's not giving anybody a  
16 lot of opportunity to respond to the points.

17 MR. FINI: What I did was, I called opposing counsel  
18 this morning to clarify that was, in fact, his understanding.  
19 As soon as he told me it wasn't, I immediately drafted a letter  
20 so your Honor would not be blindsided by me raising this issue.

21 THE COURT: Candidly, whatever tentative agreements  
22 the parties may have had back before the briefing on the motion  
23 to dismiss, you know, all of that I would think would be  
24 altered somewhat by my order, which kind of signals that it  
25 seems to me that the plain language of the contract at issue in

1 this case supports the plaintiff's interpretation.

2 It's not shocking to me that in light of my order from  
3 July 11 that prior discussions about stays and everything else  
4 might go by the boards.

5 What I was contemplating, frankly, is we go straight  
6 to summary judgment because if it is in fact the case that the  
7 contract is unambiguous, then we don't really need a whole lot  
8 of discovery, it seems to me.

9 MR. FINI: Couple of things, your Honor. First of  
10 all, I would ask for the ability to make a formal motion for  
11 the stay because opposing counsel has orally read and  
12 characterized what's going on in the FINRA complaint and what's  
13 going on there selectively.

14 In fact, what's going on in the FINRA proceeding is  
15 exactly what is alleged in the complaint here. In the  
16 complaint in this case there is direct overlap of the facts  
17 being alleged both as to the breach of contract and the fraud  
18 claim.

19 THE COURT: Is the FINRA arbitrator going to decide  
20 whether there was a breach of the contract?

21 MR. FINI: The facts that plaintiff Cottam knew, which  
22 included the SEC filings, which my prior counsel neglected to  
23 tell you, was incorporated by reference in the agreement.

24 THE COURT: Say that again. Was incorporated --

25 MR. FINI: In the transcript of premotion motion to

1 dismiss that your Honor held, when you were trying to  
2 understand the motion to dismiss as to the contract claim, my  
3 prior counsel did not point out to your Honor, which is not  
4 your fault, that the subscription agreement on page 9  
5 specifically incorporates by reference the Cleantech SEC  
6 filings that would be forthcoming.

7 That is very important to your Honor's thinking about  
8 this case because those SEC filings reflect reverse splits that  
9 occurred after the date the form subscription agreement was  
10 printed. Those reverse splits, which are incorporated by  
11 reference into the agreement and are part of the agreement,  
12 would render the cap table numbers. The number of shares on  
13 the cap table are actually incorrect.

14 So the date that the form was printed, those numbers  
15 of shares were correct. As of the date that the parties, when  
16 they invested his money, the parties were, in essence,  
17 operating under a cap table that didn't accurately reflect the  
18 number of shares. But upon reading the document --

19 THE COURT: I'm reading page 9. It says: The  
20 subscriber should carefully consider the risk factors contained  
21 in Cleantech's most recent annual report on form 10-K.

22 MR. FINI: But it says: The subscriber should  
23 carefully consider the risk factors contained in Cleantech's  
24 most recent annual report on a form 10-K, as updated or  
25 supplemented by subsequent quarterly reports in the form of

1 10-Q, and current reports in the form of 8-Ks, to the extent  
2 filed, each of which -- by each of which, I'm referring to the  
3 public filings, not just the risk factors.

4 THE COURT: I don't know. It says: If any such risk  
5 factors actually occur, then basically the subscriber is on  
6 notice that that's a possibility. Are you saying that the  
7 splits were a risk factor?

8 MR. FINI: Well, your Honor, on summary judgment, when  
9 we bring in front of you all of the public filings and when we  
10 take Mr. Cottam's deposition and you find out what he knew as  
11 of the date, as a sophisticated investor, what he knew as of  
12 the date he submitted his investment, we respectfully submit  
13 that your Honor will conclude that the cap table on page 2 was  
14 a form that was printed in June and that that form and the  
15 number of shares reflected does not reflect the state of the  
16 world.

17 And under New York law, when there is a mistake in  
18 fact in the agreement, there is a mutual mistake or unilateral  
19 mistake in every case involving reformation in the case. In  
20 every case, the plain text of the contract presents a problem.  
21 If the plain text always ruled, there would be no doctrine of  
22 mutual mistake or unilateral mistake. The whole point of those  
23 doctrines is when the contract, for whatever reason, says  
24 something that is absurd, that is just not true in the world.

25 THE COURT: I don't see why it's absurd. It seems to

me that the mistake is not a mutual mistake. The mistake is the decision to split stock in advance of the transaction that's described and contemplated in the subscription agreement.

MR. FINI: Your Honor, respectfully, a few things on that. Number one, Mr. Cottam received his shares, which are numbered in 400 and something thousand, in September of 2014. The number of shares, 400 something thousand versus 2.9 million, is so dramatic that if he thought he didn't get the shares he was entitled to, it was incumbent upon him to say something at the time before the eggs were scrambled.

Had he said he was entitled to 2.5 million more shares in September of 2014, 6D would have brought a declaratory judgment action and sought a declaration to either rescind and give him his money back, if he was under a false impression that there were that many shares, or the Court could have reformed when all of the investors were fresh, having received their shares.

What he instead did, he took his shares in 2014, where the number of shares is dramatically different, he then waited until 2015 to sell his shares, in August. He sells his shares for a profit and then later, in 2016, he sues in this court and says, I didn't realize that I didn't get the number of shares I should have gotten.

Well, then, every investor under that theory, every

1 investor should have gotten 6.9 times the number of shares.

2 The transaction would have been impossible because on page 2 it  
3 contemplated the number of shares being outstanding that in  
4 fact were not outstanding.

5 THE COURT: What was the point of putting this in on  
6 page 2 of the agreement?

7 MR. FINI: The point on page 2 was to reflect as of  
8 the date that the form was printed the number of shares.

9 THE COURT: It doesn't say that.

10 MR. FINI: It says on page 2: Whereas there are  
11 currently an aggregate of --

12 THE COURT: And upon raising the maximum offering of  
13 5.1 million, Cleantech will be capitalized as follows.

14 MR. FINI: Yes, Judge. Your Honor, I want to say  
15 something. You are absolutely correct that this agreement,  
16 ideally, should have had a sentence that said, if there are  
17 reverse splits, which I understand were necessary to actually  
18 make this transaction possible, which we will get testimony  
19 from an expert on, you are absolutely correct, that it would  
20 have been very good for there to be a sentence that says that  
21 the 50,000 shares and the one-to-one ratio have to be adjusted  
22 to account for any reverse splits so that the proportionate  
23 ownership of each investment is adjusted so that everybody is  
24 treated equally.

25 One thing, for sure, your Honor, I think you would

1 agree with, Mr. Cottam is not the only plaintiff who deserves  
2 6.9 times the shares. Every investor deserves that then. If  
3 your reading is correct, if the technical reading is correct  
4 and we ignore the doctrine of mutual mistake and unilateral  
5 mistake, then every investor is entitled to 6.9 and his  
6 percentage ownership of the company would have been the same.

7 If you look at the doctrine of unclean hands and  
8 equity, you will see, when this case goes to summary judgment,  
9 if it's not stayed, which it should be stayed, which I'll get  
10 to, if this case is not stayed, all 30 investors are going to  
11 have to tell you whether they think they are entitled to 6.9 as  
12 of the time he got his shares or they all think that he's  
13 wrong, and your Honor will rule.

14 THE COURT: I don't know why I need to hear from them.

15 MR. FINI: Because they are necessary parties to my  
16 reformation claim.

17 THE COURT: I don't think I get to your reformation  
18 claim if I find it's an unambiguous contract, right?

19 MR. FINI: Your Honor, respectfully, I allege a mutual  
20 mistake and unilateral mistake claim cited --

21 THE COURT: You are now. It's the first I'm hearing  
22 of it, right?

23 MR. FINI: But it's timely. This is the first time  
24 that the defendants get to file an answer and counterclaim.  
25 You wouldn't have gotten the counterclaim before. The motion



1 to dismiss was made and so the answer wasn't due.

2 THE COURT: I understand that. I'm saying, this is  
3 the first time I'm hearing it.

4 MR. FINI: That's right. The prior counsel, when the  
5 prior counsel spoke to you, due to no fault of your own, didn't  
6 flag a lot of the issues that I'm flagging now that you will  
7 read about in summary judgment. When you read it and you see  
8 that this plaintiff waited over a year after he saw how many  
9 shares he had --

10 THE COURT: That's like a laches defense. You're  
11 asserting a sort of laches defense, that he waited too long?

12 MR. FINI: On an affirmative claim, you certainly have  
13 a laches waiver, gratification. He received the number of  
14 shares which, to a sophisticated investor, if you think you are  
15 entitled to 2.9 million shares, you don't notice that you only  
16 have 400,000 shares? Honestly, your Honor?

17 If this case doesn't present the issues of waiver and  
18 unclean hands and laches, then I don't know what does. Because  
19 if you accept the number of shares that reflect the reverse  
20 splits that are in the public filings that are incorporated by  
21 reference, you then sell those shares, you make a profit and  
22 then two years later you file an action and you come up with an  
23 acute plain text argument and you say, well, I was entitled to  
24 a one point ratio, but that ignores that there is a mistake in  
25 this contract.

1           If you read the contract to not incorporate those SEC  
2 filings, page 2, indisputably, has a mistake in fact in the  
3 world. And there absolutely are cases which we will cite in  
4 summary judgment which when courts are faced with that type of  
5 mistake, whether it would result in an absurd result, whether  
6 the transaction would have been impossible, had he raised this  
7 at the time, we would have rescinded it and given him his money  
8 back.

9           If he had not raised this claim timely, 6D could have  
10 offered him to rescind his investment and give him his full  
11 money back. The reason why he didn't choose to raise it timely  
12 is he actually made money. He made money on the sale of the  
13 stock that he actually got.

14           Instead of, your Honor, being able to rescind, your  
15 only option now is to reform under our counterclaim or on his  
16 affirmative claim, look at his conduct and say, wait a minute,  
17 on your affirmative breach of contract, didn't you waive,  
18 aren't you guilty of estoppel and laches? You sold the stock,  
19 which is a dramatic difference in the number of shares. It's  
20 not something he didn't notice. It's 2.9 million he's saying.

21           THE COURT: Let me stop you. I'm not sure why this  
22 stay is going to fix any of these problems.

23           MR. FINI: The reason why the stay is relevant is  
24 because if your Honor is not convinced by the complaint, which  
25 the complaint on its face has overlapping facts on the same

1 exact issues --

2 THE COURT: What about the resolution in the  
3 arbitration is going to affect any of this?

4 MR. FINI: There are any number of things that can  
5 happen in the arbitration that your Honor would want to know  
6 before you ruled. Let me give you an example. The claim of  
7 fraud is absolutely predicated on the same exact theory as the  
8 breach of contract. The theory is that he was defrauded about  
9 the number of shares that he would get.

10 If the sophisticated FINRA panel -- there are three  
11 panel members. And all I can tell you, the delay in discovery  
12 was due to my opposing counsel's conduct in that FINRA  
13 arbitration. He delayed in making document requests, my  
14 understanding is.

15 If that FINRA patent says, hey, Mr. sophisticated  
16 investor, you knew about these reverse splits. You weren't  
17 really misled, right? When you got 400,000 shares in September  
18 of 2014, did you not notice that was different than 2.9?

19 If the FINRA arbitrators questioned the credibility of  
20 his statement, that goes directly to this breach of contract  
21 claim.

22 THE COURT: It seems to me that the securities fraud  
23 claim in this action is really pled as an alternative to the  
24 breach of contract. If there is a win on the breach of  
25 contract, then it seems to me that the securities fraud claim

1 is moot and dismissed as a result. You can't win on both,  
2 right?

3 MR. JANEY: Correct, your Honor.

4 MR. FINI: That's not true because the theory --  
5 securities fraud claims brings in different damages.

6 THE COURT: My point is, if the contract says what  
7 they say it says, then there was, by definition, no fraud. And  
8 so I think plaintiffs, if not explicitly, it seemed to me  
9 implicitly, were pleading securities fraud in the alternative  
10 to the breach of contract claim.

11 MR. JANEY: Your Honor, we agree that what you're  
12 articulating is reflective of the September 14 conference, our  
13 comments at the time, and our position today with respect to  
14 what happens here pending before your Honor.

15 And, again, just to iterate the point, your Honor,  
16 with respect to just the issue of the stay, FINRA is not  
17 resolving the breach of contract claim in connection with the  
18 subscription agreement. That is not what's before them.

19 With respect to the counterclaims, your Honor, that  
20 are now a part --

21 THE COURT: They were just filed a few days ago.

22 MR. JANEY: I understand that 6D defendants have new  
23 counsel, but I have to say, your Honor, given representations  
24 by prior counsel and what we understand from bankruptcy  
25 counsel, we only view these motions now as efforts to frustrate

1 the judgment, the inevitable judgment, on the basis that  
2 counsel for 6D had explicitly told us, your Honor, that their  
3 client is on the precipes of filing.

4 With respect to the mutual --

5 THE COURT: Filing for bankruptcy.

6 MR. JANEY: Yes, your Honor, which we would submit, as  
7 an aside, your Honor, mitigates against any stay here,  
8 particularly given the strength of the breach of contract  
9 claim.

10 With respect to the mutual mistake and the unilateral  
11 mistake arguments, your Honor, we submit that they are  
12 frivolous on their face. And to contextualize it in the law  
13 here in the Southern District, citing *Blum v. Spaha Capital*  
14 *Mgmt.*, LLC, 44 F.Supp.3rd 482, a 2014 Southern District case,  
15 your Honor, there are just three key points that I'd like to  
16 make based on what the district court in that case says about  
17 unilateral mistake.

18 Number one, the party asserting the existence of a  
19 mutual mistake must show that the mistake in question is  
20 mutual. Well, among other things, John Cottam was not mistaken  
21 about the number of units that he believed he was purchasing.

22 The second comment, your Honor, at 494 of that case,  
23 New York Court of Appeals, and I'm quoting the case, New York  
24 Court of Appeals has held that there is a heavy presumption,  
25 that a deliberately prepared and executed written instrument

1 manifests the true intention of the parties and, thus, the  
2 proponent of reformation must show, in no uncertain terms, not  
3 only that mistake or fraud exists, but exactly what was agreed  
4 upon between the parties. That's going to be impossible here.

5 Three, your Honor, the party alleging the mutual  
6 mistake must establish such mistake by clear and convincing  
7 evidence. 6D will not be able to establish mutual mistake  
8 whatsoever.

9 THE COURT: I guess the issue is, are they going to be  
10 entitled to get some discovery to do that, though? That is the  
11 issue. My order didn't anticipate these defenses, most of  
12 them, and suggested that if this is really about the contract,  
13 because that's what the motion to dismiss was, this is an  
14 unambiguous contract and each side saying it went their way.

15 MR. JANEY: Right.

16 THE COURT: But the motion to dismiss would have to be  
17 converted to a motion for summary judgment for plaintiffs to  
18 prevail on their interpretation of the contract, which I was  
19 about to do before I got cold feet and thought, well, no, I  
20 think it's fair to give these guys a chance to respond on what  
21 would otherwise be a sua sponte motion for summary judgment or  
22 a conversion without real notice. That's where we are now.

23 Now they are asserting affirmative defenses that  
24 presumably are going to require me to go outside of the four  
25 corners of the document, right?

1 MR. JANEY: Yes. We understand that, your Honor. The  
2 only reason that we did not file a Rule 56, the premotion  
3 letter, in accordance with your Honor's individual rules, is  
4 that, as the Court knows, not long after the order, the  
5 defendants obtained new counsel.

6 And that response, based on the issue of how the  
7 response mechanism works under your Honor's individual rules,  
8 would have placed an additional burden. We had heard from  
9 counsel requesting an extension of time to file the answer. We  
10 considered that and the response time that counsel would have  
11 needed and our determining when to file the premotion letter.

12 That said, your Honor, we are prepared to move forward  
13 with that summary judgment motion.

14 THE COURT: Now there are affirmative defenses and it  
15 sounds like you are conceding that the affirmative defenses  
16 will require at least some limited discovery, right?

17 MR. JANEY: There is no question. Our position with  
18 respect to the briefing schedule, which I interpreted in part,  
19 was inquired upon in your Honor's order.

20 We would propose, so that we are prepared with  
21 whatever extrinsic evidence or material plans to attach, that  
22 we have a short four-week discovery period. The plaintiff is  
23 prepared to file its motion two weeks after that limited  
24 discovery and submit its reply a week after that the  
25 opposition.

1 THE COURT: Before you sit down I want to ask you  
2 about a couple of the other affirmative defenses that are being  
3 asserted, some of which have been referenced, some of which  
4 not.

5 One of them that we have not really talked about is  
6 the assertion that the issues and claims in this action are  
7 subject to arbitration.

8 MR. JANEY: I just think that that's wrong. The way  
9 in which I read it, your Honor, is, I read it to understand  
10 that I think there is a preamble there at the top. Counsel is  
11 suggesting that he's new counsel and he is seeking procedurally  
12 to ensure that he is preserving certain claims. I read that  
13 particular affirmative defense only in that context. There is  
14 no view of the law that this claim is subject to arbitration.

15 THE COURT: I just want to make sure from Mr. Fini  
16 that I'm not missing something.

17 MR. JANEY: And I would say, your Honor, if I might,  
18 also add, we clarified that with Mr. Flocos, and Mr. Flocos, on  
19 the record on September 14, agreed that there is nothing under  
20 the law that would subject this to arbitration. And on the  
21 record, your Honor, we were very clear that those claims that  
22 were in fact subject to FINRA arbitration, those move to the  
23 FINRA arbitration proceeding.

24 THE COURT: Let me hear Mr. Fini on this.

25 Mr. Fini, you're not suggesting there is an



1 arbitration provision that covers these claims, right? You are  
2 saying there is some overlap and I should stay, but you are not  
3 saying that the issues and claims in this action are subject to  
4 arbitration.

5 MR. FINI: Your Honor, frankly, as new counsel, I  
6 asserted that to preserve it and there is, as you are aware, a  
7 line of authority on the nonsignatory being bound by  
8 arbitration where the issues are inextricably intertwined.

9 The reason I didn't feel we had to necessarily address  
10 that issue is because if this action is stayed pending the  
11 FINRA arbitration, which I respectfully request the ability to  
12 put in a formal motion where I point to the pleadings that  
13 opposing counsel is selectively reading from and explain why  
14 there is an absolute overlap of fact and we cannot strip the  
15 breach of contract and there is absolutely the risk of  
16 inconsistent findings and rulings, and I do want to make a  
17 motion for a stay, my belief is that if the discretionary stay  
18 is granted, we don't need to get into the woods of the  
19 intertwined theory, nonsignatory to intertwined being bound by  
20 arbitration.

21 But I would want to brief that in the alternative  
22 because I don't think that plaintiff is right to think that we  
23 can railroad this case in four weeks of discovery because he  
24 smells blood in the water based on a limited record that we  
25 were presented by my prior counsel.

1 I'm confident that this case is about -- reading  
2 everything together, it's about mutual mistake or unilateral  
3 mistake with a plaintiff who is being opportunistic in his  
4 actions. I am very confident. I need time to take depositions  
5 and add the 30 investors.

6 And this is not a bankruptcy court. Every litigant  
7 who thinks this they have a defendant who may go bankrupt wants  
8 fast justice. But this case doesn't cry out with an investor  
9 who made money that you now have to railroad this case on some  
10 fast discovery track. I vehemently disagree with that  
11 suggestion.

12 THE COURT: I guess. Is there a threat of bankruptcy  
13 at this point?

14 MR. FINI: The company is now making money. If the  
15 company gets sandbagged with one investor out of 30 who  
16 suddenly gets a judgment based on an incomplete record because  
17 the contract is being read literally without taking into  
18 account that the cap table actually misstates the number of  
19 shares, and everything else in the agreement is predicated on  
20 that cap table, if the plaintiff can get a summary judgment  
21 motion without full discovery, yeah, that might cause problems  
22 for the company, but that's a reason why I need time to defend.

23 MR. JANEY: Your Honor, if I can be heard just on this  
24 one point. I understand that counsel is new. But to the  
25 question that your Honor just posed, we have spent months with

1 bankruptcy counsel, well-regarded bankruptcy counsel who I have  
2 been cocounsel with and appeared on the other side with. His  
3 name, for the record, is Schuyler Carroll. He has made  
4 representations on numerous occasions, including the JAMS  
5 mediator, your Honor, who has tried to globally resolve the  
6 issues pertaining to the 6D defendants that this company is on  
7 the precipices. There are e-mails, there are numerous phone  
8 records of those representations.

9           Again, I understand that counsel is new. But to  
10 suggest that this company is not on the precipices, is running  
11 out of money -- and in fact counsel represented to me the other  
12 day, the company doesn't have much money. I have never heard  
13 until this very moment, being in this case for a year, almost,  
14 that this company is actually making money.

15           MR. FINI: Your Honor, can I respond to that. If you  
16 took all of the outstanding class actions, one of which was  
17 dismissed by Judge Sweet and now is on appeal, if you took  
18 those actions, and gave them credit for a settlement and you  
19 put all of the potential liability on the table, bankruptcy  
20 counsel was probably saying that the potential liability, if it  
21 occurred all at once, would result in the bankruptcy. But  
22 there is insurance money to pay settlements, including the  
23 plaintiff in this case, who was offered a hefty settlement.  
24 But the plaintiff doesn't want that.

25           THE COURT: I don't want to get into settlement. I'm

1 just asking about bankruptcy.

2 MR. FINI: They are not on the precipes of bankruptcy  
3 today. If every claim that existed out in the world, including  
4 if every investor was entitled to seven times the amount of  
5 shares, if that reading exists, absolutely this case. That's  
6 one of the ironies. If the plaintiff wins, everyone loses.  
7 There is not enough money to --

8 THE COURT: I am not going to get into that today.  
9 I'm just trying to figure out the affirmative defenses.  
10 Another affirmative defense is that plaintiff's claims are  
11 barred by the doctrine of waiver, estoppel, laches and  
12 ratification. You have not had too much time to even reflect  
13 on that because this answer wasn't filed until Saturday, I  
14 think.

15 What is the response to that?

16 MR. JANEY: Your Honor, in sum and substance, without  
17 delving more deeply into the document, I don't want to  
18 articulate facts unless they are at my fingertips here, but I  
19 believe that the record will show that John Cottam had  
20 conversations with the company. He inquired about the status  
21 of his shares. There is no view of the facts here that John  
22 Cottam simply waited for a year in order to inquire about the  
23 status of his shares.

24 Again, your Honor, I understand why counsel is trying  
25 to make in sum and substance a laches defense. We believe that

1 that's futile.

2 THE COURT: Then the other defenses are failure to  
3 join unnecessary parties, unclean hands, and a statute of  
4 limitations.

5 MR. JANEY: They are clearly, apparently, efforts to  
6 preserve. We believe, your Honor, that they are simply  
7 affirmative defenses that will fail.

8 THE COURT: Then we have counterclaims, which I guess  
9 you have to either answer or move to dismiss procedurally,  
10 right?

11 MR. JANEY: Yes, your Honor.

12 THE COURT: You can't go straight to summary judgment  
13 on those.

14 MR. JANEY: That's correct, your Honor.

15 THE COURT: Are you conceding that you can't dismiss  
16 those at this point?

17 MR. JANEY: I'm not conceding that. Just having  
18 looked at them, we are inclined that the likely scenario is  
19 that we will move to dismiss, but we need to have another  
20 couple of days to look at it.

21 THE COURT: I thought you conceded that there was  
22 going to be need to be discovery --

23 MR. JANEY: For the purposes of the Rule 56 motion,  
24 because what we are hearing from counsel -- not just today, but  
25 in a telephone conversation the other day -- that some of this

1 will flow into his opposition to the Rule 56 motion. So it  
2 creates a scenario where we need some level of limited  
3 discovery.

4 THE COURT: I guess we are going to need to get you to  
5 answer or move. I have not looked sort of like line by line  
6 through these causes of action, and I am not sure whether there  
7 is a basis to make a motion to dismiss or not or whether what  
8 you really want to do is answer and go straight to limited  
9 discovery. Sounds like you're not sure yet either. When will  
10 you know?

11 MR. JANEY: We can know by Friday.

12 MR. FINI: Your Honor, on that note, there is  
13 sometimes when counsel can't agree to go to discovery.

14 Under the federal rules, not only to add the other  
15 investors under Rule 14, but under Rule 15, of course, I have  
16 an ability to amend as of right.

17 I came into this case on Monday. Counsel, as a  
18 professional courtesy, gave me five days. I had asked for two  
19 weeks to file my answer and counterclaim. But, apparently, he  
20 didn't have authority from his client to give any extension,  
21 and I appreciate the five-day extension.

22 But I am going to plead with more particularity the  
23 mutual and unilateral mistake, to lay out a lot of the facts  
24 that I did for your Honor about how this sophisticated investor  
25 got 400,000 shares two years ago, and suddenly two years later

1 realized he should have gotten 2.9, which I think your Honor  
2 will find untimely and specificity of that very interesting.

3 I would suggest that a motion to dismiss is a waste of  
4 time because these are fact-intensive issues. If counsel wants  
5 to make a motion to dismiss I would suggest, to save him time,  
6 that he wait for my amended pleading. Because if he files a  
7 motion to dismiss, I can amend in the face of that motion  
8 anyway. I just didn't want the Court to think that I was not  
9 telling him my intentions.

10 THE COURT: I am inclined to have you amend a week  
11 from today and then answer or move within two weeks after that.  
12 I'm not inclined to stay --

13 MR. FINI: Your Honor, one thing. I need to collect  
14 30 investors' names and addresses and under the federal rules  
15 I'm entitled to more than a week. I'm entitled to 14 days  
16 under Rule 14. I have a Herculean task to add those --

17 THE COURT: Fourteen days from when?

18 MR. FINI: Under Rule 14 it says that: A third-party  
19 plaintiff must, by motion, obtain the Court's leave if it files  
20 the third-party complaint more than 14 days after serving its  
21 original answer.

22 I served my original answer Saturday. Under the  
23 federal rules, under Rule 14, to add third parties in a  
24 third-party complaint, I would get 14 days. That, already for  
25 a two member firm, I'm going to be up until midnight drafting

1 this. If I get one week --

2 THE COURT: Who are the parties that you're adding?

3 MR. FINI: The parties are the investors on this  
4 chart.

5 THE COURT: You are going to bring a cause of action  
6 against those people?

7 MR. FINI: Those, under Second Circuit, under Southern  
8 District Second Circuit law, on reformation, if you're seeking  
9 to reform a contract, there is a recent Southern District case  
10 where they didn't bring in a party. There was a party to the  
11 contract and the judge said, sorry. I can't reform because you  
12 didn't bring the other parties in.

13 I am going to bring them in all in, unless counsel  
14 wants to stipulate that I don't need to bring them in. But the  
15 law says, if you want to conform and other investors will be  
16 affected by the reformation, I would have to bring them in.

17 THE COURT: Why would other investors be affected by  
18 the reformation?

19 MR. FINI: As of the date the shares are issued,  
20 everybody was entitled --

21 THE COURT: I don't care about everybody else. Nobody  
22 else has brought a claim, right? They have resolved any claims  
23 they have with your client, right?

24 MR. FINI: My clients have a right to assert a claim  
25 for reformation. And when they assert the claim for



1 reformation, the law, understandably, wants the other parties  
2 to the agreement to be affected.

3 THE COURT: How would they be affected? They would  
4 not be affected.

5 MR. FINI: They will be affected, and let me explain  
6 why. If your Honor says, I am going to apply the plain text.  
7 No matter what, I am going to look at the plain text and I am  
8 not going to look at the SEC filings. I don't want to know  
9 what this sophisticated investor knew. The other investors  
10 will say, what about us, your Honor?

11 THE COURT: I don't know what they are going to say.

12 MR. FINI: We don't know because they have to be added  
13 as parties for my reformation claim. They don't get to find  
14 out after you rule about my reformation claim. They get to put  
15 their arguments in and explain what they think about my --

16 MR. JANEY: They are not here, your Honor.

17 MR. FINI: Because I didn't add them yet.

18 MR. JANEY: They have not been in this case since  
19 September of last year.

20 MR. FINI: That begs the question. A motion to  
21 dismiss was made and an answer and counterclaim were not due.

22 MR. JANEY: Counsel at the time, if he felt, and I'm  
23 not even sure that current counsel is correct on the law, but  
24 if Mr. Flocos at K&L Gates believed that that's something that  
25 his client should have done, that should have happened then.

1 MR. FINI: No.

2 MR. JANEY: This is an issue of delay.

3 MR. FINI: That's not true. The motion to dismiss  
4 were granted.

5 THE COURT: Stop. This is turning into sort of you  
6 just having a debate with everybody and talking over everybody.  
7 It doesn't work that way and I don't care how long you have  
8 been in the case. You don't get to do that. OK?

9 MR. FINI: OK.

10 THE COURT: Have a seat.

11 MR. FINI: I apologize.

12 THE COURT: The bottom line is, I appreciate that new  
13 counsel has come in here, but it's new counsel with a very  
14 different notion of what this case is about than former  
15 counsel. And the counterclaims are ones that weren't raised  
16 before at all. And you filed this on Saturday, which means  
17 nobody has had a lot of opportunity to look at this, and then  
18 another letter today literally 40 minutes before I took the  
19 bench. There has not been a lot of time to review any of this.  
20 I'm not faulting you. You got retained and what are you going  
21 to do.

22 The bottom line is, I have not heard a good reason to  
23 stay this proceeding, to wait to see what goes on in the FINRA  
24 arbitration. It's not clear to me that what goes on there will  
25 have any impact on what I'm going to be deciding here and

1 doesn't sound like they are any closer than I am, frankly, to  
2 resolving this case. I would put a dollar down that says I'll  
3 resolve this faster than they do.

4 I am not going to stay. If you want to make a formal  
5 motion, you can, but I will tell you I have heard nothing to  
6 suggest that a stay is warranted in this case. I'm almost  
7 certain to deny such a motion.

8 In the meantime, we are going to go forward. The  
9 first thing to happen is, an answer to the counterclaims. And  
10 if you are going to amend, I guess you should amend. You  
11 should move quickly on that.

12 And if, Mr. Janie, you don't feel like waiting to make  
13 your motion for summary judgment, then you can make it right  
14 away. But I think at the end of the day the motion for summary  
15 judgment and the counterclaims are going to be intertwined to  
16 some extent. If I find that the language of the agreement is  
17 unambiguous, I suppose I can deal with your motion and then we  
18 can deal with the counterclaims after that, or the fact that  
19 it's going to take longer to file an amended answer and  
20 counterclaims and a little bit of time for you to answer or  
21 respond, isn't necessarily going to cripple us with respect to  
22 your motion for summary judgment.

23 But I'm also sensitive to the fact that the defendants  
24 might be -- I'm not accusing anybody of bad faith, but I'm  
25 concerned that this might all be a stall that is going to

1 result in the defendants being utterly judgment proof and in  
2 bankruptcy with a stay that freezes us all. If and when there  
3 is such an automatic stay, obviously, I will abide by it. But  
4 I don't have to wait around for that to happen, I don't think.

5 Do you want to make your motion or do you want to wait  
6 until after you've had a chance to answer the amended  
7 counterclaim?

8 MR. JANEY: We are going to proceed, your Honor.

9 THE COURT: When do you want to make it?

10 MR. JANEY: It will be filed by next Friday. If I can  
11 put my eyeglasses on, I can tell you the exact date.

12 THE COURT: The 11th.

13 MR. JANEY: Yes. Thank you, your Honor.

14 THE COURT: You mean a week from Friday.

15 MR. JANEY: Yes, your Honor.

16 THE COURT: The 11th. OK.

17 Then, in the meantime, you can amend your answer and  
18 counterclaim, and it seems to me your answer and counterclaims  
19 will largely be responsive to the motion for summary judgment.

20 MR. FINI: Your Honor, respectfully, can I please  
21 comment. Respectfully, in light of the defenses that I've  
22 asserted, and all of those defenses and counterclaims were  
23 timely, a motion to dismiss was made and under the rules --

24 THE COURT: I get it.

25 MR. FINI: In light of my defenses and counterclaims,

1 for the plaintiff to make a motion for summary judgment that  
2 you decide in the abstract that based on the clear language I'm  
3 ruling on summary judgment, for example, that then doesn't take  
4 into account my defenses to that very claim. I honestly have  
5 not seen that.

6 Normally, since the summary judgment would have to  
7 take into account my defenses and the deposition testimony and  
8 the documents about what Mr. Cottam knew and when, and even if  
9 the plain reading means something, the counterclaim comes in  
10 about mutual mistake. Those, all for judicial efficiency,  
11 would be decided together in one joint summary motion.

12 I think, your Honor, what plaintiff's counsel is  
13 proposing would require two sets of summary judgment motions,  
14 which all it's going to do to 6D is double and triple my time  
15 in the case because I have to respond to his motion without the  
16 discovery that I'm saying is the very defense to the motion,  
17 and then I'd have to make my motion.

18 THE COURT: That can be your defense to the motion,  
19 that you need additional time for discovery.

20 MR. FINI: Since we are here and we all know what the  
21 issues are, the question is, is that the most efficient way and  
22 the best way --

23 THE COURT: It seems to me that what you are arguing  
24 is the most efficient way is to do nothing and wait for FINRA  
25 to get around to resolving what appears to me to be a largely

1 unrelated arbitration.

2 MR. FINI: First there is the stay issue, which we do  
3 maintain. If you deny the stay, and I have to talk to my  
4 client about whether to spend the money to make the formal  
5 motion, in light of your comments. Let's say there is no stay.  
6 Now we have the issue of, we will have discovery in this case.  
7 It will go forward and then there would be, at the end of  
8 discovery, cross motions for summary judgment. That would be  
9 the normal procedure. Why would you have a motion for summary  
10 judgment based on a motion to dismiss --

11 THE COURT: Because he thinks you are all wet and he  
12 doesn't want to wait, and I am not sure that he's wrong. He is  
13 basically saying he has got a summary judgment motion that is  
14 going to prevail on just the contract. If that's true, then he  
15 shouldn't have to wait. You've got counterclaims and  
16 affirmative defenses that suggest you are going to need some  
17 discovery. You are going to flesh those out. That can be your  
18 response to his motion for summary judgment, that it's  
19 premature to do this because I need discovery on the following  
20 things. I guess you can say that. And you can elaborate on  
21 why it is you need it more than you've had a chance to today,  
22 and then he can reply and say why that's true or not true or  
23 something else. But at least that way we are back on track,  
24 and I don't see how that harms anybody.

25 MR. FINI: Again, the problem with it is that I then

1 have to submit a set of papers that specifies with more  
2 particularity what I have laid out, your Honor, today, and then  
3 your Honor will have that and then you'll have to decide that  
4 motion. Unless it's just an abstract motion, you will decide  
5 that motion knowing that we are going through discovery, and  
6 then I am going to rebrief with the deposition transcripts and  
7 the exhibits to the deposition transcripts all of the  
8 information that shows that Cottam knew the number of shares he  
9 got two years before --

10 THE COURT: I understand this. That's going to be  
11 your response, I think, to his motion, is that it's premature  
12 and that you should get discovery first and you will develop  
13 that.

14 MR. FINI: All I'm asking your Honor is, if you can  
15 reconsider and set one summary judgment schedule like is done  
16 in most cases, that's respectfully my request.

17 THE COURT: It's only going to be one motion if I  
18 agree that we should have discovery first, and I don't think  
19 you have made the case for that yet.

20 MR. FINI: Hold on. Now I'm confused. I thought that  
21 we were going forward now with discovery. And that while we  
22 were going forward with discovery he could make his motion if  
23 he wanted, but I get discovery.

24 THE COURT: No. I think he's conceding that your  
25 counterclaims would entail some limited amount of discovery. I

1 don't know what that would look like. He has not seen your  
2 full answer yet. He might say that your answer and  
3 counterclaims or that your counterclaims should be dismissed  
4 because there is a lack of specificity or lack of factual  
5 allegation. I don't know.

6 But it seems to me we are either going to do this in  
7 two stages or one stage after discovery, which you guys don't  
8 even agree on what the discovery should be, right?

9 MR. FINI: Your Honor, we have not served discovery  
10 requests and it would be a deposition of Cottam and a document  
11 request of the documents that he got. It would like any other  
12 case, the documents that he received in connection with the  
13 subscription agreement, the documents that show what he sold it  
14 for.

15 THE COURT: Is there any dispute as to what he sold it  
16 for?

17 MR. JANEY: No, your Honor, there is no dispute.  
18 That's why our position is, we are prepared to go ahead and  
19 file the Rule 56 motion. If counsel believes, as your Honor  
20 has articulated, that he needs particular things, the  
21 opposition will force him to lay those out. We will then reply  
22 to them, and your Honor will determine on the basis of that  
23 Rule 56 motion.

24 THE COURT: At the end of the day it may be that you  
25 get exactly what you want. I say the motion is denied as



1 premature, we are going to have some discovery. I'll have a  
2 better idea of what that discovery will look like and then we  
3 will set a discovery schedule. I don't see the downside of  
4 doing it that way.

5 MR. FINI: Again, what I'm trying to articulate, and  
6 I'm not doing a good job, your Honor, is, normally after a  
7 motion to dismiss is denied there is a window of discovery and  
8 then a summary judgment deadline that's set after the  
9 discovery. I'm having trouble understanding why would there be  
10 a summary judgment motion made without a deadline.

11 THE COURT: Because this would be a summary judgment  
12 motion on a contract that requires no extrinsic evidence and  
13 requires, therefore, no discovery whatsoever. He could have  
14 made that motion out of the gate but didn't. I almost made it  
15 for him sua sponte but ultimately didn't.

16 But I'm not inclined to say, let's all just wait  
17 another six months to figure out what discovery shows, whether  
18 there really is an issue as to why he doesn't win on an  
19 unambiguous contract. It seems to me this allows you to make  
20 your case as to why there is a need for discovery because I'm  
21 not sold on it yet. It doesn't make him wait around for two,  
22 three, or six months.

23 MR. FINI: I guess my confusion is, if I allege a  
24 claim for mutual mistake and unilateral mistake and I plead it  
25 with detail and explain to your Honor the mistake that existed

1 and that it was mutual or, if not, it was unilateral, there was  
2 deceptive conduct by the fact that he knew what he got, and I  
3 this lay this out as best I can, normally I would get some  
4 discovery and the client wouldn't need an immediate motion for  
5 summary judgment. It just seems unfair.

6 THE COURT: This immediate motion for summary judgment  
7 I think is going to be pretty short. It's basically this  
8 contract on its face says exactly what the plaintiff believes  
9 it says, which is it requires a transfer of a certain number of  
10 shares. And the agreement allowed for stock splits later,  
11 after the deal is consummated, but it doesn't contemplate  
12 reverse stock splits in advance. Not sure why. And so he is  
13 saying he wins on the face of the document. I don't think it's  
14 that different than what their briefing was in opposition to  
15 your predecessor's motion to dismiss.

16 I don't think it's going to require a whole lot of  
17 work. It's going to require you to articulate why you think  
18 you need this additional discovery in light of your  
19 counterclaims, what that discovery is, and how that makes the  
20 current motion premature. And maybe I'll agree with you, or  
21 maybe you guys will agree among yourselves that there is a  
22 certain amount of discovery that you should do that you can  
23 agree on. If that's the case, you can propose it. But I am  
24 not going to wait indefinitely. If he wants to make a motion,  
25 I am going to let him make the motion.

1 MR. JANEY: Thank you, your Honor.

2 THE COURT: Let's talk about a schedule for that  
3 motion. You were saying by the 11th of August you are going to  
4 file your motion for summary judgment, which I don't expect is  
5 going to be terribly long because I think I know what you are  
6 going to say.

7 In the meantime, Mr. Fini, you are going to be  
8 amending your answer and counterclaims and doing that by when?

9 MR. FINI: I was going to ask for 21 days to do that.

10 THE COURT: That's fine. 21 days from today is the  
11 21st, and then that will give you two weeks to also respond to  
12 his motion. It will be 30 days to respond to his summary  
13 judgment motion, which will be a couple of weeks after you've  
14 filed your answer and counterclaims, which I think will inform  
15 your opposition briefing. So you are basically working on both  
16 at the same time, but I'll give you a little bit of extra time  
17 to do that. Let me just give you the firm date. I'll give you  
18 until September 8. That's the Friday of the first week in  
19 September after Labor Day just because things can get hairy and  
20 people may want to take vacations. I get that. Then a reply.

21 MR. JANEY: We can do the reply two weeks thereafter,  
22 your Honor.

23 THE COURT: That's the 22nd.

24 Maybe in the interim all of this becomes more clear as  
25 to what you guys are shooting at. If that's the case, let me

1 know, but I don't see a downside to doing it this way. I think  
2 at the very least it's going to at least help me narrow the  
3 issues. And if I do conclude that Mr. Fini is right and we  
4 need some limited discovery, I will have a better idea as to  
5 what that is because that will be the substance of his  
6 opposition.

7 It seems to me on the face of the contract Dr. Cottam  
8 has the better argument. That's what I said in my prior order.  
9 Maybe you will educate me as to why your counterclaims and  
10 limited discovery will require that we put off that motion.  
11 You'll get a chance to develop it. I don't think that's a  
12 draconian or particularly onerous schedule. I think that's  
13 legit.

14 Anything else we should cover today?

15 MR. JANEY: Not today. Thank you, your Honor.

16 THE COURT: Once I see the papers, then I can resolve  
17 it, and then we will set a discovery schedule as needed or, if  
18 it's not needed, then we don't need to do it.

19 In the meantime, keep me posted on what's going on in  
20 the arbitration. Since one of you, at least, thinks it matters  
21 to what we are doing here, I guess I should at least be  
22 apprised.

23 MR. JANEY: Yes, your Honor.

24 THE COURT: Anything else, Mr. Fini?

25 MR. FINI: No. I just wanted to thank your Honor for

1 granting me on Monday when I asked for the extension to file  
2 the answer. Your Honor took that immediately and I wanted to  
3 thank you because it saved me from having to file the same day,  
4 so thank you.

5 THE COURT: That's fine.

6 I'll issue a short order that just memorializes these  
7 dates and then we will see where we are.

8 Thanks a lot. Enjoy the rest of the summer.

9 I thank the court reporter. If anybody needs a copy  
10 of this transcript, you can take it up with the court reporter  
11 later through the website because I am running behind on a  
12 couple of other matters.

13 Thank you.

14 o0o